IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 782

RONALD F. JOHNSON,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 702.

RONALD L. JOHNSON,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

BRIEF FOR THE RESPONDENT.

Statement of the Case.

This case is before this Court on a writ of certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts. Petitioner Ronald L. Johnson was tried before a jury, together with one Graves, in the Superior Court of Suffolk County, Massachusetts, and convicted of first-degree murder of a Boston police officer, James O'Leary. The jury recommended that the death penalty not be imposed on Graves, but made no such recommendation as to petitioner.

The facts may be summarized as follows: On the evening of August 1, 1963, Johnson, armed with a revolver, entered and robbed a Boston liquor store. After Johnson left the store, he was pursued by the manager of the liquor store and others, including police officer James B. O'Leary. O'Leary and others continued the chase until Johnson was

seen entering the passenger side of a waiting Buick convertible being driven by co-defendant Graves. O'Leary approached the automobile and ordered Graves out of the car. O'Leary then proceeded to the passenger side of the vehicle. As he did so, he was shot and mortally wounded by Johnson (A. 335-336).

Graves hurried from the car (A. 59), which was then driven away by Johnson. A description of the car as well as its license-plate number was obtained (A. 62-65) and relayed *via* police radio (A. 67) to police officers in a patrol car. The officers observed the car and driver Johnson a short time later (A. 67-69) and pursued him through several streets in the Fenway and Roxbury section of Boston. During the pursuit the car driven by Johnson struck a wall, hit four or five motor vehicles, and finally came to a halt after hitting a bus (A. 69-71). Petitioner was seen limping from the crash scene (A. 76) and shortly thereafter was apprehended in the vicinity, hiding under a porch (A. 87-88). Tests revealed that a revolver, found at the crash scene (A. 73), was the murder weapon (A. 84-85), and that Johnson had recently fired a revolver (A. 201-204). The stolen money was also recovered at the crash scene (A. 95).

The trial commenced on January 13, 1964, and was concluded on January 25, 1964. During the course of the trial petitioner objected to the introduction of a confession, and a voir-dire hearing was held to determine whether or not it had been given voluntarily (A. 96-186). The sole basis for the claim of involuntariness was alleged physical mistreatment by police (A. 188-189, 325). The trial judge found the statement voluntary and ruled it admissible (A. 325).

Thereafter, in the presence of the jury, the confession was introduced into evidence through the testimony of the police stenographer who took the statement. Defense coun-

sel objected again to the introduction but chose not to articulate his reasons for objection, merely stating that the grounds were the same as for the voir dire (A. 191).

At the close of the Commonwealth's case, Johnson chose to present no evidence. The evidence of the Commonwealth, even excluding the confession, was so persuasive that defense counsel in his summation conceded his client's guilt, saying in part:

> "I wouldn't, after listening to all this testimony, I wouldn't now try to convince you that you should find the defendant Ronald Johnson not guilty. . . .
>
> ". . . I am not about to try to insult your intelligence.
>
> ". . . I ask you only one thing, come back with a recommendation that Ronald Johnson be sentenced to prison for his natural life." (A. 205-206.)

Defendant himself then gave an unsworn statement to the jury, saying in part:

> ". . . All the evidence which the prosecutor presented to you was true.
>
> ". . . Please recommend clemency, life imprisonment." (A. 207.)

Having heard the defense summation and Johnson's unsworn statement, the trial judge instructed the jury without charging the jury on the issue of voluntariness of the confession (A. 207-239). Petitioner did not ask the trial judge to instruct the jury on the issue of voluntariness, nor did he take any exception to the charge.

Following his conviction on January 25, 1964, Johnson filed a motion for new trial on October 1, 1964. The motion was based on the principle enunciated in the case of *Esco-*

bedo v. *Illinois*, 378 U.S. 478, which had been decided subsequent to petitioner's conviction (A. 325). Attached to the motion were affidavits in which Johnson claimed for the first time that he had requested and been denied counsel (A. 242-243).

After hearing and because there was a conflict of testimony on several points of importance, the trial judge thought it appropriate to report the facts (A. 325). In his "Findings, Rulings and Order" he indicated *inter alia* that resolution of the question whether or not *Escobedo* should apply retroactively should more appropriately be resolved by the Massachusetts Supreme Judicial Court.

Included in the judge's findings of fact were the following: that Johnson had been injured prior to arrest when he collided with the bus; that he had not been beaten by police; and that he had not asked for counsel, nor been refused the opportunity to consult with counsel (A. 327-328).

In addition to these articulated findings, the trial judge also heard evidence indicating that petitioner was not inexperienced in dealing with police, nor given to meekly submitting to authority (A. 299-300, 314-315, 311-312, 313, 315-316, 322-323). When taken into custody in the present case, he repeatedly insisted that he knew his rights (A. 286-287, 295-296), and also asked challenging questions of identifying witnesses at the line-ups (A. 288-290, 303, 304, 320-321).

With respect to Johnson's physical condition at the time he gave the statement, the trial judge heard conflicting testimony about Johnson's appearance while in custody (compare A. 30, 61, with A. 37-38, 42-43, 49, 50), and learned that Johnson received medical attention shortly after his arrest (A. 81-84, 93) and that he had been given food (A. 317).

After consideration of the above evidence and having had "full opportunity to observe Johnson's mental capabili-

ties" (A. 340) when petitioner testified at the voir-dire hearing, the trial judge concluded:

> "I was satisfied by the fair weight of the evidence presented on the issue of the alleged involuntary character of the 'statement' that defendant gave it voluntarily." (A. 327.)

Thereafter petitioner appealed the conviction and the denial of the motion for new trial to the Supreme Judicial Court of Massachusetts. As regards the issues now before this Court the Massachusetts Court held that—

> 1. "There was no error in the judge's ruling at the completion of the voir dire that Johnson's statement to the police was admissible in evidence. . . . The only ground upon which the defendant objected to its admission was that it 'was involuntarily given because of physical force applied to the defendant by the police.' The question was one of fact to be decided by the judge in the first instance. The judge found, after hearing, that there had been no physical coercion of the defendant. In a statement of findings subsequently filed (*Commonwealth* v. *Cook*, Mass. , - *) the judge stated that Johnson's testimony that the statement had been made because of physical abuse or threats of abuse by the police was 'unreliable and not believable.' Since the evidence upon which the defendant relied to exclude the statement was found unworthy of belief, the judge properly concluded that the statement was admissible."
>
> 2. ". . . [T]he factors [*i.e.*, failure to warn Johnson of his rights, the mentality of the accused, and

* Mass. Adv. Sh. (1966), 1103, 1105-1106.

Johnson's physical condition at the time he gave his statement to the police] to which the defendant now points as bearing upon the voluntariness of Johnson's statement were considered and passed upon by the judge during the hearing on the motion for a new trial. In addition to the evidence introduced, the judge had full opportunity to observe Johnson's mental capabilities. He was also aware of Johnson's physical condition at the time the statement was given to the police. The Judge's extensive findings of fact show that he was not required, as matter of law, to conclude that the statement was involuntarily given. (Citing cases). The question was one of fact. The denial of the motion for a new trial shows that the judge was unpersuaded by the new evidence concerning voluntariness and left undisturbed his finding at the voir dire that Johnson's statement was 'freely and competently' given."[1]

3. ". . . The defendant's conduct of his cases indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury. 'It is well settled that a party cannot reserve for a motion for a new trial a point that he could have raised at the trial.' *Commonwealth* v. *Doyle,* 323 Mass. 633, 638, and cases cited. This rule has particular pertinency when the point now argued was omitted not by the oversight, but by the purpose, of counsel. The representation implied in the conduct of the defence was that the issue of voluntariness was not in controversy. The judge was

[1] On this issue the Court additionally held that these factors could have been raised at trial and it was incumbent upon the defendant to do so. His failure to raise them, coupled with the fact that the defendant chose not to pursue the issue of voluntariness, persuaded the Court that there was no error.

therefore under no duty to charge the jury on that issue. . . .."

The petitioner did not assign as error in the Massachusetts Supreme Judicial Court that petitioner's Fourteenth Amendment rights were violated because the Court imposed on petitioner the burden of proof on the issue of voluntariness (A. 331-333). Nonetheless, the opinion of the Massachusetts Court did note that, pursuant to Massachusetts law as of the date of trial, a confession was *prima facie* voluntary, and that the burden was on the defendant to show the statement was not voluntarily made (A. 337). The Massachusetts Supreme Judicial Court did not discuss the question of burden of proof in light of federal constitutional standards.

Summary of Argument.

In the totality of the circumstances, the confession of the petitioner should be declared voluntary. There was no physical coercion, and any possible psychological coercion must be viewed in the light of the individual characteristics of the petitioner and his ability to withstand pressure. Petitioner's military experiences as a guard, past criminal experience, and his continued belligerence to the police officials, during the period of interrogation, negate any inferences of coercion. Indeed, this fact situation presents a far less possible situation of coercion than in those cases where this Court has affirmed State Court findings of voluntariness. (*Infra*, at pp. 8-15.)

The Massachusetts Court, further, considered all relevant evidence on the question of voluntariness. Any lack of findings or indications in the lower Court's written decisions revealing the context in which this evidence was

considered results from the purposeful trial methods of petitioner and his counsel. (*Infra,* at pp. 15-18.)

Similarly, the issue of voluntariness was not submitted to the jury for determination because petitioner and his counsel obviously concluded that it would not be in petitioner's best interest. Instead, they conceded petitioner's guilt, choosing rather to plead with the jury not to impose the death penalty. This conclusion is additionally warranted because of petitioner's failure to present evidence in the context of voluntariness which would have allowed the jury to pass on that issue. (*Infra,* at pp. 18-20.)

Lastly, this Court should not pass on whether the burden to prove a confession involuntary may constitutionally be placed on the defendant as it was not passed on in the lower Courts. Petitioner did not assign this issue as error to the Massachusetts Supreme Judicial Court. While that Court did articulate the usual Massachusetts rule on its own volition, it did not discuss that rule in the light of federal standards, because petitioner never raised such issue. (*Infra,* at pp. 20-21.)

Argument.

I. The Confession of Johnson was Voluntary.

An examination of the record compels the conclusion that, in the totality of the circumstances, the confession of Johnson was voluntary. A determination as to whether or not a confession is voluntary must necessarily be resolved by a close examination of facts unique to the particular case in question. Respondent will demonstrate that the circumstances surrounding the confession of Johnson are such that the determination of the Court below that the confession of Johnson was voluntary should be affirmed. Indeed, the facts of this case present far less a

possible situation of coercion than the facts of cases where this Court has held coercion to be lacking. See *Stein* v. *New York*, 346 U.S. 156 (1953); *Lisenba* v. *California*, 314 U.S. 219 (1941); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951).

There was, of course, no physical coercion established, since the trial judge found as a matter of fact that Johnson's testimony that the confession had been made because of physical abuse or threats of abuse by the police was unreliable and not believable (A. 327). Furthermore, facts which might indicate mental or psychological coercion or pressure must be viewed in the light of the individual characteristics of the petitioner and his ability to withstand pressure. See, *e.g.*, *Stein* v. *New York*, 346 U.S. 156; *Lisenba* v. *California*, 314 U.S. 219.

Bearing this framework in mind, the following are the only circumstances indicating pressure or coercion.

(1) An eight-hour, overnight detention in a police-dominated atmosphere (A. 325-326);

(2) An unsuccessful attempt to give part of the *Miranda* warning (A. 286, 328);

(3) Intermittent questioning for periods of uncertain length throughout the night;

(4) Probable lack of sleep (but no indication of petitioner's normal sleeping pattern and little indication of when he last slept);

(5) Two line-ups and a confrontation with witnesses, after which petitioner was asked to explain the fact that he was identified as the perpetrator of the crime (A. 288-289, 304-306, 310-311);

(6) Bodily injuries of uncertain nature and extent (A. 326).

These circumstances of pressure must be weighed against Johnson's powers of resistance. At the time of his arrest,

Johnson was twenty-nine years old (A. 19). He had attended school to the level of grade 8 (A. 19), or, in any event, attended junior high school (A. 268). Psychometric tests performed upon Johnson approximately three months after brain surgery (A. 24, 169), at a time when his electroencephalogram was abnormal, revealed a full-scale I.Q. of 86. During his military service he was a brig guard for more than a year (A. 323). He had significant prior experience with police and criminal procedure.[2]

It is true that his I.Q., as measured under less than ideal conditions,[3] was just above the mean in the dull-normal range.[4] But the reliability of such tests, even when performed under ideal conditions, is of questionable value in determining the actual intelligence of an urban dweller in

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[2] During the hearing on motion for new trial, Johnson testified on direct examination that he had been arrested or taken into police custody on only two prior occasions: (1) when he was arrested for speeding in Foxboro, and (2) when he was "picked up and . . . turned loose at Station 10" about nine months before the arrest in question (A. 246). On cross-examination, he admitted to a February, 1963, arrest for suspicion of armed robbery (A. 264), an arrest when "I turned on my gas in my house without authority" (A. 265), an arrest when "I slapped a girl" (A. 266), and a five-hour custodial interrogation concerning a robbery (A. 283). Later during the hearing, police officers testified that Johnson was (1) Arrested in 1956 for a motor-vehicle violation in Foxboro (A. 299-300); (2) Arrested in 1958 for assault with a dangerous weapon upon a policeman (and later acquitted) (A. 314-315); (3) Arrested in 1959 for disorderly conduct (A. 311-313); and (4) Arrested (or taken into custody) in June of 1963 for homicide (A. 315). Johnson did not again take the stand to contradict this.

[3] "[Reliability] simply assumes reasonable co-operation and effort by the subject, no gross distractions. . . ." Lawyer's Guide to Medical Proof, Marshall Houts (Matthew Bender & Co., 1966), § 20.10 (8).

[4] See Lawyer's Guide to Medical Proof, Marshall Houts (Matthew Bender & Co., 1966), § 20-11, fig. 20-2.

socially and economically depressive circumstances. In any event, Johnson's practical intelligence and sophistication in police affairs far outweigh any deficiencies in his intelligence quotient. He was no stranger to criminal investigation and, in prior contacts with police, he had not been "dumb" as to his rights to the presence of the arresting officer.[5] See *Stein* v. *New York, supra.* Nor was he less outspoken on the occasion in question.[6] Also, Johnson's military experience with criminal law enforcement as a brig guard (A. 323) and as a defendant (A. 322) must have acquainted him with the scrupulously protected right to silence under the Uniform Code of Military Justice. See *Miranda* v. *Arizona,* 384 U.S. 436, 489 (1966). Further indication of his practical intelligence occurred in his reaction to being identified at the several line-ups where he tested the ability of several witnesses to identify him by asking questions much as a trial counsel would do.[7]

The record does not indicate clearly whether Johnson did any sleeping during the time between his arrest and the

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[5] *1956:* "He said he didn't have to make a call, even the law and I [a policeman] couldn't book him" (A. 300). *1958:* "Well, they'll have to prove it" (A. 315). *1959:* "I don't have to tell you . . . cops anything and I don't have to go anywhere with you . . . cops" (A. 312). "I know my rights. I don't have to answer a . . . question" (A. 313).

[6] "He said . . . he wasn't going to tell us cops anything" (A. 287). "I am not signing any . . . thing and you police can't make me sign it. I know my rights" (A. 296).

[7] "Are you sure that I am the person?" (A. 288). "Well, if there were ten . . . colored men in this line-up, could you pick me out?" (A. 289).

"Did you see me shoot the cop? . . . But you said you saw me shoot the cop" (A. 289).

"[I]f he was a long way from the car, how did he spot me?" (A. 304).

confession. However, even the complete absence of sleep during these hours would be of no value in gauging his power to resist unless there was evidence of when he had last slept prior to his arrest. For all that appears in the record, Johnson, unemployed at that time (A. 98), may have slept until noon or later on the day of the crime.[8] Under such circumstances lack of sleep during the time between his arrest and confession is of no relevance. It is true that the petitioner was injured. But the record does not indicate that he was docile, suggestible, or subject to intimidation. On the contrary, his military and criminal experience would displace any such suggestion.

The respondent does not deny that Johnson may have had some injury or that he was in a police-dominated atmosphere for most of the eight hours in custody, or that no warning of rights was given, other than the attempt, thwarted by Johnson himself, to warn him of the right to use the telephone in order to speak to a friend, relative, bail bondsman or lawyer (A. 328).[9] What the respondent does deny is that the undisputed facts and fair inferences therefrom are pieces in the picture of a broken will.

The foregoing facts present less of a possible situation of coercion or pressure than in those cases where this Court has affirmed State Court findings of voluntariness. *Stein* v. *New York, supra. Lisenba* v. *California, supra. Gallegos* v. *Nebraska, supra.*

In *Stein* v. *New York,* 346 U.S. 156, the period of detention was four times as long as the period here. The interrogation sessions totaled roughly twelve hours; here, the

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[8] The petitioner stated in the confession that he left his house early on that day, went to the Savoy for a while, and left there about half-past 2.

[9] Lieutenant Richardson testified: "and I told him that he had the right to call his attorney, bail commissioner, friends or family under 276, 33A of the General Laws" (A. 286).

actual length of sessions could not, by any stretch of the imagination, have totaled more than two and one-half hours.[10] This Court, however, held that the confession was voluntary in view of the individual characteristics of the defendant. Johnson, similarly to the petitioner in the *Stein* case, was neither "young, soft, ignorant or timid," nor was he inexperienced in the ways of crime or its detection, "nor . . . dumb as to [his] rights." *Stein* v. *New York, supra,* 185, 186.

In *Lisenba* v. *California, supra,* the petitioner was arrested on Sunday morning, held during the day, and questioned for one hour. Commencing at 7:30 p.m., he was questioned in relays throughout the night, allowed to eat breakfast and questioned again until 3 a.m. Tuesday, when he either fainted or fell asleep during interrogation. During this period he was "slapped" by a detective. He had no sleep during the first forty-two hours after arrest. Two weeks later he was questioned throughout most of the day, and, after supper, into the night. Immediately preceding his confession, he had been subjected to a six-hour period of constant interrogation. The interrogation ended when the petitioner said (at page 242): "if you fellows will take me out to eat now, I will tell you the story." His prolonged confinement without arraignment violated California law. Nonetheless, in view of petitioner's self-possession, coolness

[10] Petitioner claims that Johnson was subjected to frequent questioning and confrontations with witnesses. Yet, the only officer known to have interrogated Johnson testified (A. 181) that he saw him only "briefly" at District 10, then during the two lineups at headquarters (A. 304-306, 310-311), for a period of less than one hour, and finally for about fifteen to twenty minutes prior to the taking of the statement (A. 181). Giving a generous interpretation to the brief time period at Station 10 and including the time which Johnson gave the statement, the total time period Johnson could have been subjected to interrogation could not have exceeded two and one-half hours.

and acumen exhibited throughout the trial and questioning, this Court concluded that he had not lost his freedom of action and that his statements were not the result of his deprivation of free choice to admit, deny, or refuse to answer. Johnson displayed these same characteristics, and indeed his statements to the police (see footnote 4) are of the same nature and quality as the statement of the petitioner in *Lisenba* to the effect that there were not enough men in the District Attorney's Office to make him talk. *Lisenba* v. *California, supra.*

In *Gallegos* v. *Nebraska, supra,* the petitioner was a thirty-eight-year-old Mexican farm hand who neither spoke nor wrote English. He was arrested and detained incommunicado except for intermittent questioning by state officers for four days. No warning of rights was given and he was without benefit of counsel. Part of the time he was kept in an eight-foot by eight-foot cell with no windows, called the "dark room" or "punishment room," although he was a "docile prisoner" and did all he was told to do by the officers. The petitioner vaguely asserted that one of the rooms which he occupied for a twenty-one hour period was without a bed; that another he occupied was without light or poorly lighted; that the food was sparse, perhaps not more than a meal a day; and that he was told he might be turned over to the Mexican authorities for more severe questioning. This Court declared the confession to be voluntary, and characterized the facts as being of uncertain character and lacking definiteness. *Gallegos* v. *Nebraska, supra,* 68.

Likewise, any substantial facts pointed to by petitioner are uncertain, lacking definiteness, and therefore should be disregarded. One such fact is the extent of Johnson's injuries. Of the five witnesses who testified to seeing Johnson in the line-up, one Megna, who stood 10 to 15 feet from petitioner, unequivocally said: "No, there was not any

blood in his face" (A. 61). The others were not sure.[11] The trial judge found that Johnson was not beaten by the police (A. 327). Indeed, he found unbelievable his testimony that he was not injured before he left the Buick car. Moreover, the extent of his injuries was never clearly established, and therefore no inferences should be drawn as to his potential inability to withstand possible pressure or coercion factors. Under such circumstances the finding of the lower Courts should stand.

Lastly, there are no factors indicating "contrivance," suggested by petitioner. The attempt by the police to warn Johnson of his statutory rights under Massachusetts law, which were thwarted by Johnson's belligerence and non-co-operation, negates any suggestion of contrivance.

II. The Massachusetts Courts Determined the Issue of Voluntariness in Accordance with Proper Standards.

The trial Court considered all relevant factors in conformity with due process in reaching its determination of voluntariness. Petitioner's allegations that the trial Court failed to consider, *inter alia,* intelligence, physical condition and lack of warning are quite unwarranted in view of the record.

The evidence that the petitioner now says was not considered was before the trial Court, both at the voir dire and at the hearing on the motion for a new trial. In connection with the voir dire there was evidence of Johnson's age

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[11] Robert Gannon observed no blood on the head or face, but only some blood stains on the shirt front (A. 30). Mary Ann Taylor said Johnson was "bleeding on the head, and he was scraped and everything all over his body." A few questions later, there occurred the following: "Q: You say he was bleeding? A: I think at the knee, too." She didn't think that she observed blood on the face. She did observe blood on the right rear of the head (A. 37). She thought the blood was flowing, but was not sure.

(A. 98), education (A. 19), occupation (A. 98), physical condition (A. 30, 37, 43, 50, 61, 169, 179), apparent intelligence and temperament; the then apparent lack of any warning of rights; and the possibly coercive nature of the situation wherein Johnson was alone in a police-dominated atmosphere (A. 189, 191-192, 325).

In addition, evidence was presented to the trial judge in connection with the motion for a new trial showing Johnson's prior experience with the police, including investigations of motor-vehicle-law violation (A. 299, 300), public-utility-law violation (A. 265), assault (A. 266), armed robbery (A. 264), assault with a dangerous weapon (A. 314-315), disorderly conduct (A. 311-313), and homicide (A. 315); lack of effective warnings of constitutional rights with more particularity, as well as attempts to give partial warnings (A. 286, 328); Johnson's character and temperament, especially his defiant attitude toward law-enforcement personnel (A. 287, 296, 300, 312, 315); Johnson's activity in cross-examining identifying witnesses (A. 288, 289, 304); Johnson's food intake during the night (A. 317); and Johnson's military experience as a defendant and a brig guard (A. 322, 323).

It was only after hearing this exhaustive evidence that the trial Court reiterated its conclusion that—

> "I was satisfied by the fair weight of the evidence presented on the issue of the alleged involuntary character of the 'statement' that defendant gave it *voluntarily.*" (Emphasis supplied.) (A. 327.)

It is of course basic that a judge is presumed to have considered all evidence before him.[12] However, in this case

[12] On the question of whether or not the trial judge considered the facts relating to warning as affecting the voluntariness of the confession, the presumption is especially strong in view of the

it is not necessary simply to rely on this presumption. The record indicates that the trial judge in fact gave intelligent consideration to the relevant factors.

Petitioner further argues that, to the extent evidence was considered, it was not considered in the proper context. Specifically he contends that the issue of voluntariness at the voir dire was considered only in the context of a claim of physical beating, and that on the motion for a new trial the trial judge concerned himself only with the application of *Escobedo*.[13] Even if true, petitioner's argument is inappropriate in light of defense counsel's specifically directing the trial Court's attention to these, and only these, considerations. In essence, petitioner asks this Court to rewrite our advocacy system. He asks the trial judge to ignore the deliberate purposeful trial methods of experienced defense counsel.

Petitioner and his council had two opportunities (*i.e.*, at the trial and on the motion for a new trial) to explore thoroughly all factors on the issue of voluntariness. They had the fullest opportunity to introduce evidence and to ask the trial Court to consider it in any context they thought most advantageous. While the record amply shows that the trial judge did consider all relevant factors, it is plain that any lack of specific finding on points petitioner is now raising in the appellate Courts results from the failure of defense counsel to seek such finding or raise such

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status of Massachusetts law, even prior to *Escobedo*, which recognized the relationship of warning and presence of counsel to the voluntariness of a confession. See *Commonwealth* v. *Valcourt*, 333 Mass. 706, 711 (1956).

[13] Petitioner points to the judge's findings, rulings and order on the motion for new trial to bolster his argument that the trial judge considered only the application of *Escobedo* and not voluntariness. Of course the trial judge is not obligated to articulate all his findings in a written opinion. *Sims* v. *Georgia*, 385 U.S. 538, 544.

points in a timely fashion. Under such circumstances petitioner's argument must fail.

III. THERE WAS NO ERROR IN NOT SUBMITTING THE ISSUE OF VOLUNTARINESS TO THE JURY IN VIEW OF PETITIONER'S DELIBERATE TACTICAL DECISION NOT TO CONTEST VOLUNTARINESS BEFORE THE JURY.

Defense counsel intentionally saw fit not to raise the question of voluntariness before the jury. Examination of the record compels this conclusion, and the holding of the Massachusetts Supreme Judicial Court on this issue is so manifestly correct that the issue hardly seems arguable.

That holding was:

> "It seems clear to us from the transcript that the defendant was content to let the issue of voluntariness rest on the ruling made by the judge in the absence of the jury. The alternative was to revive and emphasize the issue by having the judge instruct the jury that, having heard the evidence on the voir dire, he had determined that the statement was voluntarily made, and by the further instruction that the jury could find that it was involuntary if there was evidence presented to them which persuaded them to that conclusion, when in fact there was no such evidence before the jury. The defendant's conduct of his cases indicates a deliberate decision not to press the issue of involuntariness when it could have been raised seasonably before the jury. 'It is well settled that a party cannot reserve for a motion for a new trial a point that he could have raised at the trial,' *Commonwealth* v. *Doyle,* 323 Mass. 633, 638, and cases cited. This rule has particular pertinency when the point now argued was omitted not by the oversight, but by the purpose, of counsel. The

representation implied in the conduct of the defence was that the issue of voluntariness was not in controversy. The judge was therefore under no duty to charge the jury on that issue." (A. 338, 339.)

Quite to the contrary, had the judge instructed the jury under these circumstances, he probably would have committed error by interfering with the deliberate trial tactic of defense counsel, and thereby impairing petitioner's right to assistance of counsel, required by the Sixth Amendment.

Of course, the petitioner had the power to waive his right to submit the issue of voluntariness to the jury (see *Johnson* v. *New Jersey,* 384 U.S. 719, 724) and the trial judge was obliged to follow petitioner's choice. The issue of waiving petitioner's right to submit the question of voluntariness to the jury was recognized by this Court in the *Johnson* case, although this factor was not in issue. However, the strategy adopted by trial counsel in that case is revealed in the State Court opinion. *State* v. *Johnson,* 43 N.J. 572, 587, 206 A. 2d 737, 745 (1965). From that opinion it is apparent that defense counsel, just as in this case, chose to concede the issue of guilt, choosing rather to plead with the jury not to impose the death penalty.

Respondent could of course concede that waiver of a fundamental right should not be found from a silent record (*Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962)), but the record is hardly silent in this case, nor is it even necessary to find the strategic decision by implication. *Wilson* v. *Bailey,* 375 F. 2d 663, 665-666 (4th Cir. 1967).

Petitioner suggests that an alternative holding of the Massachusetts Supreme Court on the issue of submitting the question of voluntariness to the jury was that no evidence was presented to the jury from which they could find the statement was involuntarily made (Pet. Brf. 26). This indeed was an articulated reason of the Massachusetts Su-

preme Judicial Court (A. 338). However, rather than being in the alternative, it is only one more factor in an inextricable pattern lending to the inescapable conclusion that defense counsel deliberately chose not to pursue the issue of voluntariness. Petitioner argues that the conclusion of the Massachusetts Supreme Judicial Court that there was no evidence is not supported by the record. While petitioner has demonstrated the existence of some facts in evidence which might have been utilized in contesting voluntariness, the fact remains that petitioner in no way presented or elicited those facts in any framework that would have enabled the jury to appraise their bearing on the voluntariness of the statement. Petitioner, in fact, did not even state the grounds of his objection to the confession before the jury (A. 191).

In view of the deliberate decision of defense counsel, the decision of the trial judge not to submit the issue of voluntariness was manifestly correct.

IV. Whether the Defendant's Burden to Prove a Confession was Not Voluntarily Made would Violate the Due-Process Clause is a Question Not Properly before this Court.

It is well settled that, where a federal question is not first presented to a State's highest Court for decision and where that question is not passed on by the State Court, this Court is without jurisdiction to consider it in the first instance. *Congress of Industrial Organizations* v. *McAdory,* 325 U.S. 472, 477 (1945). See also *Shelley* v. *Kraemer,* 334 U.S. 1, 8-9 (1948); *Walters* v. *City of St. Louis,* 347 U.S. 231, 233 (1954); *Michel* v. *Louisiana,* 350 U.S. 91, 101 (1955); *McGoldrick* v. *Compagnie Generale Transatlantique,* 309 U.S. 430, 433 (1940).

Petitioner at no stage in the various State Court proceedings raised any issue as to the constitutionality of placing the burden on a defendant to prove a confession was involuntary. Petitioner now seeks to raise here for the first time a constitutional challenge which the Court below had no reason to consider in the light of the due-process clause of the 14th Amendment.

Although the Massachusetts Supreme Court did state in its opinion that the burden to prove the involuntariness of a confession rests on the defendant (A. 337), this comment was not in response to a matter in issue before the Court. More importantly, the Court did not discuss the question of burden of proof under federal constitutional requirements. *Beck* v. *Washington,* 369 U.S. 541, 549-554 (1962).

In the *Beck* case petitioner sought in this Court to challenge, for the first time, a state statute on the ground that it violates the equal-protection clause of the 14th Amendment. The State Court had discussed the interpretation of the state statute, but had not considered it in the light of federal standards. This Court held, at pages 553-554, that, since the constitutional challenge had never been raised before or decided by the State Court at any stage, "the argument cannot be entertained here under an unbroken line of precedent. *E.g. Ferguson* v. *Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co.* v. *Ohio,* 183 U.S. 238, 248 (1902)." Respondent submits that the same conclusion is compelled here.[14]

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[14] Assuming, *arguendo,* that the issue is before this Court, it may very well be that its determination is implicit in the holding of *Miranda* v. *Arizona,* 384 U.S. 436, to the effect that the burden of proof is now on the Commonwealth. See Warden, *Miranda: Some History, Some Observations, and Some Questions,* 20 Vand. L. Rev. 39, 53-54 (1967); Note, 80 Harv. L. Rev. 91, 206 (1966). If that is so, it should not be applied retroactively in this case, in which the trial commenced on January 13, 1964. *Johnson* v. *New Jersey,* 384 U.S. 719.

Conclusion.

For the foregoing reasons respondent respectfully urges that the decision of the Massachusetts Supreme Judicial Court be affirmed.

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